IN THE COURT OF APPEALS OF IOWA

No. 3-998 / 12-2039
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MATTHEW VILLALPANDO,
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Mark D. Cleve, Judge.

A defendant appeals his judgment and sentence for third-degree sexual abuse, challenging the sufficiency of the evidence to support an element and his sentence. **JUDGMENT AFFIRMED, SENTENCE VACATED, AND CASE REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, Martha J. Lucey, Assistant Appellate Defender, and Matt Jarvey, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Molly Tracy, Student Legal Intern, and Alan Ostergren, County Attorney, for appellee.

Heard by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

VAITHESWARAN, J.

Matthew Villalpando appeals his judgment and sentence for third-degree sexual abuse. *See* Iowa Code § 709.4(2)(c)(4) (2009). He contends (1) the record contains insufficient evidence to support an element of the crime and (2) he should be afforded an evidentiary hearing to determine whether his mandatory twenty-five-year sentence was cruel and unusual as applied.

I. Sufficiency of the Evidence

The jury was instructed that the State would have to prove the following elements of third-degree sexual abuse:

> 1. On or about October 30–31, 2010, the Defendant performed a sex act with [K.C.]
> 2. The Defendant performed the sex act while [K.C.] was 14 years old and the Defendant was four or more years older.
> 3. The Defendant and [K.C.] were not then living together as husband and wife.

Villalpando asserts that the State presented no evidence on the third element. Because his attorney did not file a motion for judgment of acquittal challenging the claimed absence of proof on this element, he raises the assertion under an ineffective-assistance-of-counsel rubric.

Ineffective-assistance claims based on challenges to the sufficiency of the evidence ordinarily can be decided on direct appeal. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). To prevail, Villalpando must establish the breach of an essential duty and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[I]f the record reveals substantial evidence [to support the finding of guilt], counsel's failure to raise the claim of error could not be prejudicial." *Truesdell*, 679 N.W.2d at 616.

To reiterate, the third element of the crime required proof "[t]he Defendant and [K.C.] were not then living together as husband and wife." Villalpando asserts the State did not prove this element in its case-in-chief. We are obligated to view the evidence in the light most favorable to the State. *State v. Hennings*, 791 N.W.2d 828, 832–33 (Iowa 2010).

Viewed in this light, the State's evidence reveals the following facts. K.C. was fourteen years old at the time of the crime. She testified that she and a friend went trick-or-treating and then "went to [Villalpando's] apartment." She stated she was not there all night. At some point, she and her friend went to the house of her friend's mom; Villalpando came over later. After committing a sex act on her, "he left." K.C. "[s]pent the rest of the night" at her friend's house. Based on this record, we are persuaded that the State presented substantial circumstantial evidence of non-cohabitation. *See State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981) (stating direct and circumstantial evidence are equally probative). Villalpando's ineffective-assistance-of-counsel claims based on the absence of sufficient evidence necessarily fail. *See Truesdell*, 679 N.W.2d at 616.

II. Sentence

After finding Villalpando guilty of third-degree sexual abuse, the jury was asked to determine whether Villapando was the subject of a prior juvenile delinquency adjudication for third-degree sexual abuse. The jury found he was. Based on that adjudication, the district court invoked and applied Iowa Code section 901A.2(3), a sentencing provision that requires a person to serve "twice the maximum period of incarceration for the offense, or twenty-five years,

whichever is greater notwithstanding any other provision of the Code to the contrary."

On appeal, Villalpando contends he was never afforded "the opportunity to present evidence that the mandatory sentence under section 901A.2(3) was grossly disproportional to his underlying crimes." He cites *State v. Bruegger*, 773 N.W.2d 862, 884, 886 (Iowa 2009), in which the Iowa Supreme Court vacated Bruegger's sentence and "remand[ed] the case for a new sentencing hearing to allow Bruegger and the State to present evidence as to the constitutionality of section 901A.2(3) as applied to [him.]" The State agrees *Bruegger* requires a remand. Accordingly, we vacate Villalpando's sentence and remand for a hearing on whether section 901A.2(3) is unconstitutional as applied.

JUDGMENT AFFIRMED, SENTENCE VACATED, AND CASE REMANDED FOR RESENTENCING.